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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN MASON, et al

PETITIONERS,

v.

THE CONTINENTAL GROUP, INC.,
CONTINENTAL CAN, U.S.A.,
AND THE UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER ERISA CLAIMS FOR VIOLATIONS OF FIDUCIARY DUTY ARE SUBJECT TO THE "EXHAUSTION OF REMEDIES" DOCTRINE.

II. WHETHER PETITIONERS' CLAIMS FOR FRAUD WERE BARRED BY PETITIONERS' FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES UNDER THE LABOR MANAGEMENT RELATIONS ACT.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals Mason v. Continental Group, Inc., 763 F. 2d 1219 (11th Cir. 1985), appears in the Appendix. The opinion of the district court, Mason v. Continental Group, Inc., 569 F. Supp. 1241 (N.D. Ala. 1983), also appears in the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on the 21st day of June 1985. A timely petition for rehearing was filed on July 10, 1985, and was denied on the 24th day of July 1985. This Court's jurisdiction is invoked under the Employee Retirement Income Security Act of September 2, 1974, 29 U.S.C. § 1001, et seq.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Employee Retirement Income Security Act of September 2, 1974, 29 U.S.C. § 1001, et seq.

STATEMENT OF THE CASE

John A. Mason filed suit on behalf of himself and others similarly situated (hereinafter referred to collectively as "Petitioners") on November 26, 1980, against Respondents, Continental Group, Inc., and Continental Can Company, USA (hereinafter referred to collectively as "Respondent Company") in the Equity Division of the Circuit Court of Jefferson County, Alabama. Petitioners claimed damages for breach of contract, intentional and willful fraud, breach of fiduciary duties resulting from fraudulent representations and omissions of material facts, violation of the Alabama fraud statutes, §§ 6-5-101 through 6-5-104 (Ala. Code 1975), and conspiracy. (R. 5-16)

Both an answer and a petition for removal were

filed on December 29, 1980. (R. 1-19, 22-24) The answer asserted that Petitioners' claims were subject to the grievance and arbitration procedure provided in the collective bargaining agreement and that the Petitioners had failed to exhaust these administrative remedies. Removal was sought on the basis of the original jurisdiction of the District Court for the Northern District of Alabama pursuant to § 301 of the Labor Management Relations Act, Title 29 § 185(a). Petitioners filed a motion to remand which was overruled on February 12, 1981. (R. 25) The complaint was amended on May 8, 1981, by adopting and realleging the averments of the previous complaint and by adding a count claiming damages for violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. (R. 32-33)

Petitioners amended their complaint with leave of court on December 7, 1981, to specifically aver that their claims were not subject to the grievance and arbitration procedures provided in the collective bargaining agreement and to allege that the conduct from which the

Petitioners sought redress was not "related to wage, hours, or conditions of employment." Petitioners also added count eight to the complaint which stated a cause of action against the United Steelworkers of America, AFL-CIO (hereinafter "Respondent Union") for breach of their duty to fairly represent Petitioners and for fraud and conspiracy. (R. 68-70)

Continental Can, U.S.A., one of the respondents herein, was the employer of Petitioners. Petitioners worked for a company owned by Respondent Company in Birmingham, Alabama, known as Plant 411. (Paulson depo. at 14, 15) Plant 411 was a three-piece can manufacturing system which basically dealt with lithographing and the production of can ends. (Paulson depo. at 19) The average age of the employees was forty-one and one-half years, and the average years of employment at Plant 411 was eleven and one-half years. (Rexford depo. at 84) Plant 411 was opened in 1968 or 1969 and ceased operation completely in the third quarter of 1979. (Paulson depo. at 24, 57, 58) Petitioners were represented by the Respondent Union and were

contractually obligated under the Master Agreement between Respondent Continental Can, U.S.A. and Respondent Union under an agreement dated November 1, 1977. Under the contract, Respondent had the right to close a facility for "legitimate reasons" or "economic reasons." (Master Agreement p. 10, Art. 6) (Middleton affidavit at pp. 17, 28)

Can manufacturing technology began to change in 1975. Respondent Company planned a gradual transition of converting three-piece technological plants to two-piece manufacturing process plants or, in the alternative, locating a two-piece plant in the general geographical locations of a previously existing three-piece plant. (Paulson depo. at 19) Beginning in 1975, Respondent knew that Plant 411 was to close because of this change in technology. (Paulson depo. at 19, 20) The decision to close the plants or to convert a three-piece plant to a two-piece plant was of great magnitude to Respondent Company and the strategy of conversion was to be coordinated over several years as testified to by Mr. Glen Alan Paulson, the general manager of the southeast

division of Respondent Company. (Paulson depo. at 21, 22, 24) Respondent Company made a determination to phase out the three-piece system at Plant 411 and construct a two-piece manufacturing process plant in Atlanta, Georgia. The Atlanta plant was, in fact, completed and in operation approximately one year prior to the closing of Plant 411 (Paulson depo. at 34, 35). The opening of the Atlanta plant coordinated with the closing of Plant 411 in Birmingham. (Paulson depo. at 34, 35)

The decision to close Plant 411 was kept secret and confidential from all employees affected by the contract in existence with Respondent Union. Though the decision to close the plant was anticipated and known by Respondent Company from 1975 to 1979, it was not disclosed to the employees affected by the closing until the announcement was made in 1979. (Paulson depo. at 47, 48, 61, 62, 64, 65; Rexford depo. at 67) The decision to close Plant 411 was admittedly kept confidential from the employees because Respondent did not want the employees to know about it. (Rexford depo. at 67)

During the period of time that Respondent Company

was planning the closing, Respondent Company used secret, confidential computerized methods of controlling employee costs known as Bell I and Bell II. (Rexford depo. at 51, 52, 57, 58) The purpose of Bell I was to have available to management an understanding of employee costs and the corresponding ability to minimize employee costs within the perimeters of the contract. (Rexford depo. at 57) Bell I dealt with strategic long-term obligations as an approach to planning and costs while Bell II dealt with operating costs during a calendar year. (Rexford depo. at 59) The purpose of the Bell plan was to be able to project employee costs at various locations at periodic levels and have a better understanding of where committed obligations were and the implications of those obligations, pension liabilities, and other expenses as a basis for business decisions. (Rexford depo. at 44, 45) The Bell plans were confidential documents not to be disclosed to any employees, unions or competitors. Its value to Respondent Company was that it gave an edge in controlling employee costs. (Rexford depo. at 51, 52)

While the decision to close Plant 411 was based on

"economic reasons," (Middleton affidavit at 17, 38), Respondent Company had the option of either laying off the employees of Plant 411 or terminating them. Termination was more expensive because of the necessity of payment of severance pay as compared to paying subsistence pay to laid-off employees. Therefore, Petitioners were "laid off." Yet, no intention ever existed on behalf of Respondent Company of recalling any of the employees who were "laid off" from Plant 411. (Paulson depo. at 73, 74)

The retirement system of Respondent Company was an accumulated point system. Retirement points were based on years of service with Respondent Company added to the age of the employee. The two rules which governed the Petitioners were the "rule of sixty-five" which provided that an employee with twenty years of service as of the last day worked and enough years of age to equal sixty-five points could retire with a normal pension. There was also a "seventy/seventy-five" rule which combined the age of the employee with years of service so that an employee with enough years of service

to equal seventy-five points could retire. Both plans provided fairly substantial job security benefits. (Rexford depo. at 53)

The potential obligations and liabilities of Respondent Company increased for employees who accumulated sixty-five points under the "rule of sixty-five" and the "rule of seventy/seventy-five." (Rexford depo. at 54) By using the Bell plan to consider these potential obligations and liabilities, Respondent Company could control employee costs by closing certain plants and opening others. It was to the benefit and advantage of the Respondent Company to have no employees reach a certain number of years or to accumulate the necessary points for retirement. (Rexford depo. at 58) Employees could retain or receive additional employee benefits by accumulating points which were computed based upon age and years of service. (Rexford depo. at 57) Respondent Company could avoid potential liability to employees by not allowing any of the employees to reach sixty-five points for retirement purposes. (Rexford depo. at 54) It was economically advantageous to Respondent Company,

on a long-range planning basis, to have as many employees as possible with less than sixty-five points. (Rexford depo. at 55)

Additionally, after an employee had worked for Respondent Company for fifteen years, he was entitled to participate in an expanded employment program (EEP) which allowed him a thirteen-week vacation over a five-year period. At the end of the five-year period, he would be entitled to another thirteen-week vacation. (Rexford depo. at 56) As a result, Respondent Company incurred more expenses in providing employees with more than fifteen years of service these additional vacation benefits. (Rexford depo. at 56, 57) Bell II took into consideration the increased costs for employee benefits on the basis of the thirteen-week vacation after an employee had been employed for more than fifteen years. (Rexford depo. at 58) After an employee worked fifteen years for Respondent Company, the costs incurred for that employee increased. (Rexford depo. at 86)

The decision to close Plant 411 was made by Messrs. Olson, Grant, Snider and Paulson. (Paulson depo. at 38,

39) At least one of these, Mr. Paulson, understood that Bell I and II were methods used to keep up with the age, years of service, and sex of the employees to better define the employee costs for purposes of strategic planning. (Paulson depo. at 57, 58) In relying on Bell I and Bell II to make the decision to close Plant 411, Respondent Company attempted to establish a computation of the least costs for employees, taking into consideration all factors of employee costs such as disability income benefits, EEP, overtime expenses, contingency locations, inventory control and seniority systems. In deciding to hire new employees in the Atlanta plant and close the Birmingham plant, Respondent Company made the decision based upon the costs of the expanded employment program, the costs of the seniority system, and the costs of future retirement pension benefits of Plant 411 employees contrasted with the costs of hiring new employees for the Atlanta plant. (Paulson depo. at 76)

The contract with the Respondent Union provided under Article Six "Management Responsibilities" page 10,

that the Plant could be closed for "legitimate reasons," which in the instant case, according to the Respondent Company and Respondent Union were "economic reasons." (Middleton affidavit at 17, 18; Newell Transcript at 7) Thus, filing a grievance with the Union would have been futile when Plant 411 was closed for "economic reasons" unless there had been proof at the time Petitioners were "laid off" that the plant was closed for reasons other than economic reasons. (Newell Transcript at 8) As further evidence of the futility of filing a grievance, Mr. Newell, the union representative, specifically told the employees that there was nothing that could be done through the grievance and arbitration procedure as a result of the plant shut down and that filing a grievance would be futile because the plant closing was due to an economic situation. (Newell Transcript at 9) When the plant was closed, Petitioners were advised by officials of Respondent Union that the plant closing was not an arbitrable matter subject to the grievance and arbitration procedure. Accordingly, there was "nothing that could be done by the Union because the plant was closed for

economic reasons." (Newell Transcript at 7-9)

Respondent Company filed a motion for summary judgment on September 3, 1981, supported by the affidavit of J. C. Middleton. (R. 36-48) The motion for summary judgment was founded on the assertion that the Petitioners lacked standing in that they failed to exhaust the grievance and arbitration proceedings provided for in the collective bargaining agreement, pension plan, and insurance agreement negotiated between the Company and Respondent Union. Respondent Union filed an answer to the complaint as amended on December 23, 1981, (R. 71-76), and on April 27, 1982, Respondent Union filed a motion for summary judgment assigning in support thereto the affidavits of Ralph Gurley and David Newell. (R. 78-92)

Petitioners filed affidavits in opposition to the Respondents' motion for summary judgment. These affidavits set out Petitioners' claims as well as the facts on which the claims were based. (R. 122-178) Petitioners testified that for approximately a five-year period prior to the closing of Plant 411, the plant managers,

executives and supervisors of Respondent Company continued to assure Petitioners that there were no plans to close Plant 411 and that employee benefits, job security, and future of Plant 411 were all secure and would be protected by the Respondent Company as promised. (R. 122-178) Yet plans had been made by Respondent Company as early as 1975 to close the plant and to convert from the three-piece system to a two-piece manufacturing system. (Paulson depo. at 19, 20) The decision to close the plant, though anticipated and known by Respondent Company from 1975 to 1978, was kept confidential from the employees. As a result, the employees remained in place thereby directly benefiting Respondent Company. Respondent Company used executives, managers and supervisors to deceive Petitioners about the eminent closing of the plant and the future job security of Petitioners. (R. 122-178)

The Atlanta plant was opened with new employees who had no seniority and who had a different union with a different contract. The employee cost factor was substantially less for the Atlanta plant than that of Plant

411. The opening of the Atlanta plant was the scheme and design of Respondent Company to lower the cost and expense of Petitioners. (R. 122-178) The representations of plant and job security were false and were known to be false by Respondent Company, and these misrepresentations were relied upon by the Petitioners to their detriment. (R. 122-178)

Summary judgment was granted in favor of both on July 27, 1983. (R. 195) The court issued a separate memorandum opinion on July 27, 1983. (R. 183-194) The district court stated that the Petitioners had failed to comply with the grievance and arbitration procedures provided by their collective bargaining agreement and failed to show an excuse therefor. The opinion also stated that the Petitioners had failed to bring their cause of action for unfair representation against the Respondent Union within the applicable statute of limitations and that the allegations of fraud and conspiracy were unsupported by the facts. The opinion also stated that the Respondent Company was entitled to be dismissed from the lawsuit because the Petitioners had failed to comply with the

grievance and arbitration procedures provided in the collective bargaining agreement and had failed to show an excuse for this noncompliance.

Petitioners filed a notice of appeal on August 25, 1983. (R. 196) The Eleventh Circuit Court of Appeals affirmed the judgment of the trial court on the 21st day of June 1985. A timely petition for rehearing was timely filed on the 10th day of July 1985. This petition was denied on July 24, 1985.

REASONS FOR GRANTING WRIT

I. THE ELEVENTH CIRCUIT ERRONEOUSLY HELD THAT PETITIONERS' ERISA CLAIMS WERE SUBJECT TO THE "EXHAUSTION OF REMEDIES" DOCTRINE. THIS HOLDING IS IN DIRECT CONFLICT WITH THE HOLDING OF THE NINTH CIRCUIT.

The Eleventh Circuit in its opinion in the instant case, Mason v. Continental Can, 763 F.2d 219 (11th Cir. 1985), held that Petitioners were required to exhaust their remedies under a pension plan agreement before they could bring claims involving violations of ERISA's statutory provisions in federal court. In so holding, the

Eleventh Circuit agreed with the Seventh Circuit's holding in Kross v. Western Electric Company, 701 F.2d 1238 (7th Cir. 1983), but is in direct conflict with the Ninth Circuit which reached a contrary conclusion in Amaro v. Continental Can Company, 724 F.2d 747 (9th Cir. 1984). The Ninth Circuit in Amaro rejected the reasoning of the Kross decision and held unequivocally that such claims of statutory violations are not subject to an "exhaustion of administrative remedies" doctrine.

Petitioners respectfully contend that the reasoning of the Amaro decision is consistent both with the statutory language of ERISA and its legislative history. "Under the conference agreement, the participant may bring a civil action against any person who interferes with his rights which are protected under the Act." H. R. Conf. Rep. No. 93-1280, 93d Cong., Second Session, reprinted in 1974 U. S. Code Cong. and Admin. News, pp. 5038, 5110. The Eleventh and Seventh Circuits, however, have held that despite the fact that the text of ERISA does not mention an exhaustion requirement, one should be imposed by the courts.

The Ninth Circuit in Amaro, held that the exhaustion of arbitration procedures was not required prior to bringing a statutory claim under ERISA. The claim brought against the defendant, Continental Can Company, in the Amaro decision was very similar to the claim brought against Respondent Company in the instant case. The complaint in Amaro alleged that the company had laid off employees to prevent them from obtaining the number of years of continuous service required to qualify under the pension and welfare plans. As noted by the Ninth Circuit, ERISA does not mandate or even recommend an internal appeals procedure for claims which fall within the protection offered by ERISA. Further, the court noted that resolution of claims under ERISA involves statutory interpretation which is a task for the court and not for an arbitrator. 724 F. 2d at 751 (citing Alexander v. Gardner-Denver Company, 415 U.S. 36 (1975)). In the words of the Amaro decision, "judicial procedures are more capable of safe-guarding individual statutory rights than are arbitral procedures. . . . 'Arbitrators very often are powerless to grant the

aggrieved employees as broad a range of relief,' [Alexander and Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U.S. 728, 745, 101 S. Ct. 1437, 1477 (1981)], as is available under ERISA." 724 F. 2d at 752.

In the Alexander opinion, the court ruled that Title VII plaintiff should be allowed to pursue an action at law after having lost a parallel contractual claim in arbitration. While his collective bargaining agreement barred the very racial discrimination of which he complained, the court set down the generally acknowledged principle that labor arbitration is an inappropriate form for the enforcement of minimum substantive rights and guarantees. The Court drew a vital distinction between a contractual and a statutory right: a contractual right is the product of the "majoriterian process of collective bargaining" which "may be exercised or relinquished" by the collective bargaining agent; a statutory right, however, confers minimum, non-negotiable rights to individuals. ERISA provides such minimum, non-negotiable guarantees to the beneficiaries of pension plans. These rights are therefore statutory.

Statutory rights, unlike contractual rights, are not subject to the grievance procedures of employment contracts.

The Supreme Court has not limited the holding of Alexander to Title VII actions. In Barrentine, the court held that an employee seeking to enforce a Fair Labor Standards Act claim in federal court need not exhaust a grievance or arbitration procedure. The court stated as follows:

> Not all disputes between an employee and his employer are suited for a binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitrable decision when the employees' claim is based on rights arising out of a collective bargaining agreement, different considerations apply where the employees' rights arise out of a statute designed to provide minimum substantative guarantees to individual workers.

450 U.S. at 737 (emphasis added)

A long line of cases have held that various statutory claims are not subject to the doctrine of exhaustion. For example, in McKinney v. Missouri-Kansas-Texas Railroad Company, 357 U.S. 265 (1958), the court held that the plaintiffs were not required to pursue arbitration procedures prior to asserting a statutory claim for seniority rights under the Universal Military Training and

Service Act. In U. S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971), the plaintiffs were not required to pursue grievance procedures to enforce their statutory rights to wages under the Seaman's Wage Act.

This Court has expressed a strong policy that only federal courts may decide if a federal statute has been violated. To entrust this decision to a private administrative body is inconsistent with the holdings of this Court and the language of ERISA. In enacting ERISA, Congress sought to set forth "uniform national standards for employee benefit plans and to provide for uniform remedies in the enforcement of the plans." Dependahl v. Falstaff Brewing Corporation, 653 F. 2d 1208, 1215 (8th Cir. 1981); Authier v. Ginsberg, 757 F. 2d 796 (6th Cir. 1985).

It should be noted that the ERISA claims involved in this case did not arise from a claim for benefits which had been denied. The claims procedure of the ERISA section relied upon by Respondents in the courts below in its argument that Petitioners did not exhaust their administrative remedies, 29 U.S.C. § 1132(2), was

designed for a denial of claim benefits and does not in any way relate to the Petitioners' claims for breach of fiduciary duties and the fraudulent use of the pension plan. Therefore, the claims procedure provided for by this section was inapplicable and need not have been exhausted prior to bringing suit in federal court.

The pension plan also contained an appeals procedure for participants whose claims for benefits had been denied. (R. 47) The procedure of the pension plan, Section 6 states as follows:

> Any difference that may arise between you and the company concerning your application for, your entitlement to, or the amount of payment of a lump sum retirement allowance, pension or deferred benefit, may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement. . . .

(R. 47) (emphasis added) The appeals procedure contained in this paragraph was designed to resolve differences relating to the application of, entitlement to, or amount of benefit payments. The Petitioners' claims for breaches of fiduciary duty in the fraudulent use of the pension plan do not relate to an "application for, entitlement to, or amount of benefit payments." Therefore, the Petitioners'

claims were not covered by the appeals procedure provided for in the plan.

Respondents have relied in the courts below upon Scheider v. United States Steel Corporation, 486 F. Supp. 211 (W.D. Pa. 1980); Taylor v. Bakery and Confectionary Union, 455 F. Supp. 816 (E.D. N. C. 1978); Amato v. Bernard, 618 F. 2d 559 (9th Cir. 1980); and Lucas v. Warner Swasey Company, 475 F. Supp. 1071 (E.D. Pa. 1979). These cases, however, all involve a direct denial of an employee's claim for pension benefits.

Reliance upon Scheider and Taylor is misplaced. Scheider and Taylor required the plaintiffs to submit their claims involving applications for and denials of pension plan benefits to arbitration. There are no applications for benefits in the present fact situation. The opinion in Allied Pilots Association v. Northwest Airlines, Inc., 627 F.2d 272 (D.C. Cir. 1980) is more analagous to the instant situation. The court in the Airline Pilots Association case held that contractual pension plan claims had to be arbitrated but claims for statutory breaches of fiduciary duties under ERISA do not have to be arbitrated. This is

precisely the Petitioners' contention. In Gavalik v. Continental Can Company, CV 81-1519 (W.D. Pa. 1982), the court applied the principles of Alexander and Barrentine in an action charging defendant Continental Can with violations of ERISA. In this opinion, the court distinguished Scheider on the grounds that Scheider did not involve a claim to secure statutory rights protected by ERISA. Rather, Scheider involved a claim to secure pension benefits provided for by the pension plan. In another opinion, this Court reviewed this decision, Gavalik v. Continental Can, CV 82-1995 (W.D. Pa. 1983) and again affirmed the decision that a claim for breach of fiduciary duty does not have to be arbitrated.

The instant case involves instead a claim for the breach of fiduciary duties under ERISA and the fraudulent use of a pension plan. The District Court opinion relied heavily upon the decision of Amato v. Bernard, 618 F. 2d 559 (9th Cir. 1980). The District Court, however, did not fully explore the ramifications of the Petitioners' claims under ERISA as is apparent from the casual treatment of Petitioners' claims. While the court in Amato did hold

that an employee is required to exhaust administrative procedures as set forth in ERISA, it should be noted that the plaintiff in Amato sought judicial relief for the denial of his application and claim for pension benefits. Petitioners are not seeking relief from such a denial. Rather, Petitioners are seeking relief from a violation of fiduciary duties and obligations imposed under ERISA.

The Amato opinion actually provides support for Petitioners' position that the claims are not subject to exhaustion of administrative procedures by the distinction made in the Amato opinion of Lewis v. Merrill-Lynch, Pearce, Fenner & Smith, Inc., 431 F. Supp. 271 (E.D. Pa. 1977). The court in Amato distinguished Lewis on the grounds that the plaintiff in Amato did not present a claim for violation of the fiduciary responsibilities imposed by ERISA. Amato, 618 F. 2d at 568 n. 10. Lewis involved claims that Merrill-Lynch had violated fiduciary responsibilities to the pension plan. While the defendants argued that the plaintiff had failed to exhaust his administrative remedies as set out in an agreement to arbitrate ERISA claims, the court ruled that the

agreement to arbitrate did not compel the plaintiff to submit ERISA claims to arbitration which charged a violation of fiduciary responsibilities.

The court in Lewis noted that ERISA itself prohibits an agreement which purports to relieve a fiduciary from responsibility or liability for any obligation or duty under ERISA. 29 U.S.C. § 1110. Further, 29 U.S.C. § 1132 grants participants in a pension plan the right to file a civil action to redress a fiduciary's breach of responsibilities. Reading § 1110 and § 1132 in conjunction renders any agreement which mandates that claims for breach of fiduciary duty be submitted to an arbitration procedure void as against public policy. 431 F. Supp. at 276.

The court in Amaro v. Continental Can, 724 F. 2d 747 (9th Cir. 1984) noted that there is no appeal procedure "either mandated or recommended by ERISA to cure these claims." 724 F. 2d at 751. The court also noted that statutory interpretation is a task for the judiciary. Id. at 751-52 (citing Alexander v. Gardner-Denver Company, 415 U.S. 36, 57 (1974)). The court in

Amaro went on to rely also on Barrentine v. Arkansas--Best Freight System, Inc., 450 U. S. 728 (1981). In Barrentine, the Court held that arbitration did not foreclose bringing a case involving the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. The court noted that the reasoning of both the Barrentine and Alexander decisions placed realistic limitations on the arbitration process when that process conflicts with non-waivable statutory rights. The court noted that the judicial process is more "capable of safe-guarding individual statutory right than are arbitral procedures." 724 F. 2d at 752.

Petitioners' complaint describes a statutory violation. It charges that Respondents were guilty of violations of § 510 of ERISA which prohibits discrimination intended to prevent employees attainment of benefits under an employee benefit plan. 29 U.S.C. § 1140. Congress intended that ERISA remedy a broad range of problems in the field of employee benefit plans. To subject ERISA to doctrines such as the "exhaustion of administrative remedies" doctrine is, in effect, to limit the remedies provided by the statute and in violation of

the stated purpose of ERISA. The House of Representatives' committee on education and labor noted as follows:

> Underlying the provisions of this Act is a recognition of the necessity for a comprehensive legislative program dealing not only with malfeasance and maladministration in the plans, the consequences of lack of adequate vesting, but also with the broad spectrum of questions such as adequacy of funding, plant shut downs, and plant terminations, adequate communications to participants, and, in short, the establishment of certain minimum standards to which all private pension plans must conform if a private pension promises to become real rather than illusory.

H. R. Rep. No. 533, 93d Cong. 2d Sess., reprinted in 1974 U. S. Code Cong. and Admin. News 4639, 4647-48. To hold that ERISA claims are subject to the exhaustion of remedies doctrine, would not result in conformity of pension plans to the minimum standards noted by Congress in these comments. The very purpose of ERISA was to assure equitable foundations of employee benefit plans and safe guarding the interest of plan participants. 29 U.S.C. § 1001(a). See also, LeFebre v. Westinghouse Electric Corporation, 549 F. Supp. 1021 (D.C. Md. 1982); Gilliam v. Edwards, 492 F. Supp. 1255 (D.C. N. J. 1980). To hold that the interests of plan participants are to be

subjected to arbitration procedures that will vary from procedure to procedure, is to defeat the very purpose of ERISA.

II. THE COURTS BELOW ERRED IN HOLDING THAT PETITIONERS' CLAIMS WERE BARRED AS A RESULT OF PETITIONERS' FAILURE TO FAILURE TO EXHAUST THEIR ADMINISTRATIVE REMEDIES UNDER THE LABOR MANAGEMENT RELATIONS ACT.

The District Court granted summary judgment against Petitioners on their fraud claim holding that it was barred because Petitioners had not submitted this claim to the grievance and arbitration procedures set forth in the collective bargaining agreement. Mason v. Continental Group, Inc., 569 F. Supp. 1241, 1245 (N.D. Ala. 1983). The Eleventh Circuit held likewise. Mason v. Continental Group, Inc., 763 F. 2d 1219 (11th Cir. 1985). The Petitioners' fraud claim was predicated on the fact that Respondent Company fraudulently misrepresented to the Petitioners that there were no plans to close the plant in Jefferson County, Alabama when specifically asked by Petitioners if the rumors concerning the closing of the plant were true. See Affidavit of L. G. Robertson (R.

122-124) The Respondent Company had already made a decision to close the plant at the time the misrepresentations were made. (Paulson depo. at 19-20) To determine whether the Petitioners' fraud claim was required to be submitted to the grievance and arbitration procedure, the District Court should have made a determination whether the language of the collective bargaining agreement was broad enough to require the claim to be submitted to that procedure. As this Court stated in United Steelworkers v. Warrior Gulf and Navigation Company, 363 U.S. 574 (1960) "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." 363 U.S. at 582. Both the District Court and the Circuit Court erred in summarily holding that the Respondent Company's decision to close the plant, as well as the Respondent's fraud in telling the Petitioners that the plant would not be closed, were subject to the grievance and arbitration procedures.

A claim for tort damages such as that of the Petitioners is not subject to a grievance and arbitration

requirement of a collective bargaining agreement in the absence of an explicit statement requiring arbitration of tort claims. In Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Local Union No. 584, 539 F. 2d 598 (2nd Cir.), cert denied, 385 U.S. 832 (1966), an employer filed suit for tort damages claiming that the union had induced employees of a neutral employer to engage in work stoppages in an effort to cause the employer to stop doing business with Old Dutch Farms, Inc. The union filed a motion to stay the lawsuit pending arbitration of the damage claim on the ground that the claim fell within the ambit of the general arbitration clause contained in the collective bargaining agreement. The court held, however, that a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. 359 F. 2d at 600 (citing United Steel Workers of America v. Warrior Gulf and Navigation Company, 363 U.S. 574 (1960)). Stated another way, the Court found that a tort claim is not subject to arbitration unless there is an explicit statement in the collective bargaining contract directing arbitration of a claim for tort

damages.

The Fifth Circuit adopted the same rule in Vulcan Materials Company v. United Steel Workers of America, AFL-CIO, 430 F. 2d 446 (5th Cir. 1970). In that case, Vulcan Materials Company brought suit against the defendant-union claiming damages arising out of an alleged secondary boycott. The union filed a motion to stay the proceedings pending arbitration pursuant to the collective bargaining agreement. The Fifth Circuit rejected the union's argument stating as follows:

> This matter is controlled by Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Union, Second Circuit 1966, 359 F. 2d 598, 603, cert denied, 385 U.S. 832, 87 S.Ct. 71, 17 L.Ed. 2d 67, where it was held in a § 303 suit where arbitration was sought under a broad arbitration clause that
>
> > [A]bsent a clear, explicit statement in the collective bargaining contract directing an arbitrator to hear and determine the validity of tort damage claims by one party against another, it must be assumed that the employer did not intend to forego his rights under § 303 in that the parties did not intend to withdraw such disputes from judicial scrutiny.

430 F. 2d at 458.

Under Vulcan Materials Company and Old Dutch Farms, Inc., both the district court and the Eleventh

Circuit in the instant case should have addressed the question of whether an explicit agreement existed in the bargaining agreement requiring Petitioners to file a grievance and seek arbitration of tort claims. Article 13 of the collective bargaining agreement reveals that there is no such requirement. (R. 19)

Petitioners admit that one count of the initial complaint sought recovery for breach of the collective bargaining agreement. The bulk of Petitioners' claims, however, seek recovery for verbal misrepresentations made to Petitioners. Petitioners have alleged that employees of the Respondent Company represented to Petitioners that there were no plans to close the plant. Yet while these representations were being made, plans had already been negotiated for the closing of the plant. (R. 122-23) In reliance upon the misrepresentations, Petitioners continued to work at the Respondents' plant rather than seek other employment. As redress for the fraud perpetrated upon them, Petitioners sought, among other things, compensatory damages for mental anguish and punitive damage, neither of which are available under

the grievance and arbitration provisions of the collective bargaining agreement. The fact that an employee is entitled to a remedy which can only be secured by litigation is a fact which courts have considered in holding that the employee was not required to exhaust administrative remedies prior to filing suit. Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3rd Cir. 1968); Fruit and Vegetable Packers and Ware. Local 760 v. Morley, 378 F.2d 738 (9th Cir. 1967).

This Court held in First National Maintenance Corporation v. National Labor Relations Board, 452 U.S. 666 (1981), that an employer's decision to shut down part of its business enterprises for economic reasons is not part of the "terms and conditions as set forth in § 8D of the National Labor Relations Act, 29 U.S.C. § 8(d). Therefore, the company is not required to bargain over its decision to terminate one of its operations. The Eleventh Circuit held in Weather Tamer, Inc. v. National Labor Relations Board, 676 F.2d 843 (11th Cir. 1982) that a failure to bargain over a closing is not a violation of the National Labor Relations Act. Weather Tamer was a

manufacturer of children's clothing with plants located in Columbia, Tennessee, Lewisburg, Tennessee, Athens, Alabama and Tuskegee, Alabama. The Eleventh Circuit followed the decision of the Supreme Court in First National Maintenance Corporation v. NLRB stating that a decision to close a plant is not part of the "terms and conditions" over which Congress has mandated bargaining. 676 F. 2d at 493.

The Petitioners' causes of action brought pursuant to Alabama's fraud statutes are likewise not preempted by the National Labor Relations Act. Pursuant to this Court's holding in Belknap v. Hale, _____ U.S. _____ 103 S. Ct. 3172 (1983), the Petitioners' claims for common law fraud were not preempted. In Belknap, the Court stated:

> Our cases have announced two doctrines for determining whether state regulations or causes of action are preempted by the NRLA. Under the first, set out in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed. 2d 775 (1959), state regulations and causes of actions are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. Id. at 245, 79 S. Ct. at 779. The state regulation cause of action may, however, be sustained if behavior to be regulated is behavior that is only peripheral concern to the federal law or touches interest deeply rooted in local feeling and responsibility. Id. at 243-244, 79 S. Ct. at 778-779;

> Sears, Roebuck and Co. v. Carpenters, 436 U.S. 180, 200, 98 S. Ct. 1745, 1759, 59 L. Ed. 2d 209 (1978); Farmer v. Carpenters, 430 U.S. 290, 296-297, 97 S. Ct. 1056, 1061, 51 L. Ed. 2d 338 (1977). In such cases, the state's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the board's ability to adjudicate controversies committed to the Act, Farmer v. Carpenters, supra., at 297, 97 S. Ct. at 1061; Sears, Roebuck and Co. v. Carpenters, supra., 436 U.S. at 200, 98 S. Ct. at 1759, and the risk that the state will sanction conduct that the Act protects. Id. at 205, 98 S. Ct. at 1761. The second preemption doctrine, set out in Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 398 (1976), prescribes state regulation and state law causes of action concerning conduct that Congress intended to be unregulated, Id. at 140, 96 S. Ct. at 2553, conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes. Id. at 147-148, 96 S. Ct. at 2556-2557.

_____ U. S. at _____, 103 S. Ct. at 3176-3177 (1983). In Belknap, the Court addressed the issue of whether strike replacements, who were displaced by reinstated strikers after having accepted jobs which were represented to them as being permanent and receiving assurances from the company that they would not be fired to accommodate returning strikers, could maintain common law causes of action for fraud and breach of contract. Under federal labor law, if an employee engages in an economic strike, the employer may hire permanent

replacements, and he need not discharge the strike replacements if the strikers offer to return to work unconditionally. If the strike, however, is an unfair labor practice strike, the employer must discharge replacements in order to accommodate returning strikers.

The Court found that the State of Kentucky had a substantial interest in protecting its citizens from misrepresentations that caused its citizens grievous harm. The Court noted that the "injury remedy by the state law has no relevance to the Board's function and that the Board can award no damages, impose no penalty, or give any other relief to the plaintiffs in this case." Pursuant to the tests set out in San Diego Building Trades Council v. Garmon, the Court found that the state interest involved clearly outweighed any possible interference with the Board's function that would result from permitting the action for misrepresentations perceived. _____ U.S. at _____, 103 S. Ct. at 3183.

Similarly, the State of Alabama has a substantial interest in protecting its citizens from the fraudulent misrepresentations made to Petitioners in this action, the

State interest involved in the fraudulent misrepresentations outweighs any peripheral concerns, if any, addressed by the NLRA.

The holding in Belknap is consistent with earlier holdings of this Court. In Linn v. Plant and Guard Workers, 383 U.S. 53 (1966), this Court held that false and malicious statements made in the course of a labor dispute were actionable under state law if injurious to reputation even though such statements were in themselves unfair labor practices adjudicable by the board. In Farmer v. Carpenters, 430 U.S. 90 (1977), the Court likewise held that the Act did not preempt a state action for intentionally inflicting emotional distress even though a major portion of the actionable conduct consisted of unfair labor practices. In Sears, Roebuck and Co. v. Carpenters, 436 U.S. 180 (1978), the Court held that a state trespass action was permissible and not preempted since the action concerned only the location of the picketing while the arguable unfair labor practice focused on the object of the picketing.

Even if the lower courts had been correct in their

holding that Petitioners were subject to the collective bargaining agreement and the grievance procedures set forth therein, Petitioners were excused from exhausting their remedies under this agreement because such procedures would have been futile. In Glover v. St. Louis-San Francisco Railway Company, 393 U.S. 324 (1969), this Court recognized an exception to the general rule that an employee must exhaust his administrative remedies before asserting a breach of contract claim if the administrative procedure would have been wholly futile. Petitioners, after having made numerous complaints to officials of Respondent Union, also felt that any grievance procedure would have been futile as did the union officials. (R. 122, 123; Tr. 7-9) This exception has also been recognized by the Fifth Circuit. See Ramsey v. Signal Delivery Service, Inc., 631 F.2d 1210 (5th Cir. 1980); Fulton Lodge No. 2 IAM v. Nix, 415 F.2d 212 (5th Cir. 1972); Calagaz v. Calhoon, 309 F.2d 248 (5th Cir. 1962).

Substantial evidence was presented to the trial court that the Petitioners' claims to the union would have

been futile. Respondent Union admitted that such claims would have been futile in the testimony of the union official, Mr. David L. Newell. (Tr. 7, 8, 9) Petitioners were advised by officials of Respondent Union that the plant closing was not an arbitrable matter subject to the grievance and arbitration procedures. When Petitioners tried to determine from Respondent Union what, if anything, could be done to protect their rights and to remedy the situation, Petitioners were advised that there was nothing that could be done. (Robertson's affidavit, R. 122, 123)

Ralph Gurley, staff representative of the Respondent Union, in his affidavit in support of the motion for summary judgment, stated in paragraph four as follows: "As with all collective bargaining agreements I am familiar with, the collective bargaining agreement referred to above does not prohibit the company from exercising its right to shut down its operation at any particular plant." (Gurley affidavit, R. 81). At the time the plant was closed, the employees were advised by Respondent Union officials, consistent with this affidavit

and statements set forth in oral hearing before the district court that the plant closing was not an arbitrable matter subject to the grievance and arbitration procedure. When the employees tried to determine from the Respondent Union what could be done, they were informed that nothing could be done. If officials of Respondent Union themselves stated that the Respondent Company had every right to shut down the plant and told employees that there was nothing that could be done to remedy the situation, to require the employees to exhaust the grievance and arbitration procedure would have been futile as admitted by an official of Respondent Union, Mr. Newell. (Tr. 9) The question of whether it would have been futile to submit Petitioners' claims to the grievance procedure was, at least, a question of material fact which made the summary judgment entered by the district court and affirmed by the court of appeals improper.

CONCLUSION

Petitioners respectfully request that this Court

grant the petition for writ of certiorari to the Circuit Court of Appeals for the Eleventh Circuit. As grounds therefor, Petitioners state that the holding of the Eleventh Circuit in the instant case is inconsistent with the holding of the Ninth Circuit with regard to whether claims brought under ERISA for violations of fiduciary duty are subject to the "exhaustion of administrative remedies" doctrine. Further, Petitioners respectfully contend that the holding of the Court of Appeals for the Eleventh Circuit was erroneous in that it stated that Petitioners' tort claims were barred by the exhaustion of remedies doctrine under the Labor Management Relations Act. Further, filing of such grievances would have been futile as shown by the evidence presented in this case.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition has been served upon counsel for all parties in this cause by mailing a copy of the same to their office addresses by regular United States mail, postage prepaid, this the 22nd day of October, 1985, as follows: Mr. Sidney Frazier, Cabaniss, Johnston, Gardner, Dumas & O'Neal, 1900 First National-Southern Natural Building, Birmingham, Alabama 35203; Mr. Jerome A. Cooper, Cooper, Mitch and Crawford, Suite 201, 409 North 21st Street, Birmingham, Alabama 35203. I further certify that in accordance with Rule 28.2, this Petition was deposited in a United States Post Office box with first-class postage prepaid and properly addressed to the Clerk of the Supreme Court within the time allowed for filing; to-wit: October 22, 1985.

J. Usty Yearout

J. Usty Yearout

Jack J. Hall

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